IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979 No. 79-134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Appellee*

Supreme Court, U. S.
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Brief *Amici Curiae* for Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, Laurine Ryan and Michael Long in Support of the Appellant

On Appeal from the Court of Appeals of the State of New York.

Edward H. Dowd
Attorney for Amici Curiae
NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST
Suite 810
1101 N. 17th Street, N.W.
Washington, D.C. 20036
(202) 296-1683

Of Counsel:
Myrna P. Field
MID-ATLANTIC LEGAL FOUNDATION
Suite 600
1521 Locust Street
Philadelphia, PA 19102
(215)-545-1913

John Cannon
MID-AMERICA LEGAL FOUNDATION
Suite 2245
20 North Wacker Drive
Chicago, Illinois 60606
(312)-263-5163

THE LEGAL INTELLIGENCER, 66 NORTH JUNIPER STREET, PHILA., PA. 19107 (215) 561-4850

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INTERESTS OF THE AMICI CURIAE

Pursuant to this Court's Rule 42, Mid-Atlantic Legal Foundation, Mid-America Legal Foundation, Laurine Ryan and Michael Long hereby move the Court for leave to file the attached brief as an *amici curiae*. Consent was secured from counsel for both parties. Copies of these letters have been filed with the Court.

Mid-Atlantic Legal Foundation is a nonprofit, tax exempt corporation organized and existing under the laws of Pennsylvania. Mid-America Legal Foundation enjoys similar status under the laws of Illinois. Both were organized for the purpose of engaging in litigation in matters affecting the broad public interest.

This amici brief is also presented on behalf of two recipients of Consolidated Edison's services who do not find its bill inserts objectionable and who would like to continue to receive them. Both parties acknowledge that they have not read *all* insert messages received in the past and may not read all those received in the future. Both believe that their privacy does not in any manner deteriorate by the receipt of these messages.

Mrs. Laurine Ryan receives and pays appellant's utility bills at both her residence, in Hartsdale, New York, and her business, in Hastings on the Hudson, New York.

Mr. Michael Long receives and pays appellant's utility bills at his residence and business addresses, both of which are located in Brooklyn, New York. The nature of his business, owner of an ice cream parlor, makes him a relatively high user of appellant's electricity.

SUMMARY OF THE ARGUMENT

The Court of Appeals of the State of New York has held that the Public Service Commission of the State of New York may bar utility companies from presenting statements and information concerning "controversial matters of public policy" within the billing envelopes sent to their customers. The *amici* argues that this regulation is an impermissible interference with the corporate exercise of First Amendment rights.

It asserts that a corporation has the right to speak out on controversial issues of mutual concern and that its customers have the right to be informed of corporate positions on such issues.

This Court has consistently reiterated the fact that the dissemination of information under the First Amendment is not based on either the nature of the communication nor its source. If the First Amendment is to retain its vitality, it must continue to protect the rights of dissidents from censorship based upon the personal predilections of the censor. By its regulation the Commission, an administrative agency, not even a duly constituted legislature, has spontaneously and inappropriately enabled itself to restrict the free flow of information on issues that at least one party believes should be given wide publicity.

Uncontroverted by either party is the availability of other means of communicating such beliefs. However, the economy and utility of the billing envelope make it the most facile means available to the appellant for accomplishing this purpose. Other methods of communication are burdensome, less like to be successful, and expensive.

The right of a communicant to utilize the most expeditious available means to disseminate legitimate and truthful commercial information is protected by the First Amendment as well as prior decisions of this Court.

ARGUMENT

I. The order of the New York Public Service Commission violates a utility's constitutional right to speak and the ratepayer's right to hear from management on controversial matters of mutual concern.

The order of the New York Public Service Commission challenged prohibits in relevant part "the practice of utilizing material inserted in bills rendered to customers as a mechanism for the dissemination of the utility's position on controversial matters of public policy." (Appellant's Appendix F at 58a).

At least one constitutional infirmity of the Commission's order lies in its broad scope and unjustifiable restriction on both the right of one class of speakers, public utilities, to contribute to public debate and on the right of one class of listeners, the ratepayers, to receive such information from the utility. Both groups have a legitimate right to unfettered communication appropriate to informed decisions on public policy issues of mutual interest. The ratepayers may be a captive audience, incapable of avoiding receipt of the utility's message. (Appellant's Appendix E at 43a). However, the utility likewise may be a captive speaker who cannot avoid the obligation to speak to the user audience on such matters. Increasing the cost of such communication necessarily restricts both the utility's right to speak and the consumer's right to hear from the utility on such controversial matters of public policy.

This Court has repeatedly recognized that discussion on controversial public issues is not only at the core of First Amendment protection but also the indispensable key to informed decision making in a democracy. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776-777 (1978). Yet this is precisely the type of speech which the order of the Public Service Commission limits.

Although the administrative restriction in question is nominally directed toward one cost-saving method of communication, such a limitation cannot pass constitutional muster where it effectively constitutes a prior restraint and reduces the extent of expression. Cost related limitations of the kind adopted by the Public Service Commission may be sustained only if they avoid suppression of protected communication. *Cf. Buckley v. Valeo,* 424 U.S. 1, 19 (1976).

Two of the governing principles in First Amendment analysis are the commitment of this Court to a free flow of information, regardless of the character of the speaker, and reliance on the "marketplace of ideas," not on administrative or legislative determinations to decide which viewpoint shall prevail. As Mr. Justice Brandeis eloquently stated "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression." *Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

There is little doubt that corporate speech is entitled to the full panoply of First Amendment protection. Most of our popular media operate in the corporate form.

In a series of recent decisions, this Court has refused to limit First Amendment protection based on the corporate character of the speaker and has further recognized that the Constitution serves to protect both the speaker's right to speak and the listener's right to hear. *First National Bank of Boston v. Bellotti,* 435 U.S. at 765. The protection applies to the dissemination of commercial information about products and services as well as political information. *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976).

More specifically, in *Virginia State Board of Pharmacy* this Court, citing its earlier decisions in *Lamont v. Post-*

master General, 381 U.S. 301 (1965) and *Kleindienst v. Mandel,* 408 U.S. 753 (1972), concluded that the protection afforded by the First Amendment is "to the communication, to its source and to its recipients both." 425 U.S. at 756. Thus, any attempt to limit the scope of First Amendment protection by ignoring the right of the recipients to hear from a particular source information of legitimate interest is constitutionally infirm.

The order of the Public Service Commission is so encompassing that a utility company is barred from employing the insert mechanism to disseminate its views on topics directly related both to the operation of its business and to the direct interest of the ratepayer therein. Mere characterization of the subject as a "controversial matter of public policy" is the sole requisite for application of the Commission's order.

The Public Service Commission premised its order on the rationale that ratepayers were for practical purposes a captive audience incapable of avoiding the utility's message. In reaching this conclusion the Commission impliedly rejected the notion that the consumer had any interest either in the business and operation of the utility or in hearing what management had to say on controversial matters of public policy, despite the obvious and exclusive relationship between these two groups. The flaw in the Commission's order lies in its failure to afford any significance to this relationship or to recognize the reciprocal rights and obligations which flow from it. These include not only a right and obligation on the part of management to speak but also a correlative right on the part of consumers to hear what management has to say on matters irrespective of their controversial nature that relate to the business and operation of the utility.

The management of a public utility stands in a relationship to ratepayers not unlike the one it has to company shareholders. Certainly with respect to the latter group there would be no question that management had both a

right and obligation to speak on matters of public policy that relate to the business and operation of the company whether controversial or not. The foundation of this relationship lies in the shared interest and responsibility for operation of the business.

Dissidents share the First Amendment right to communicate. However, not sharing the obligation to communicate on matters of concern to the ratepayers or shareholders, they cannot lay equal claim to the use of an enterprise's facilities in communicating their views. How far the Public Service Commission, like the Securities and Exchange Commission, might go in affording dissident views access to normal corporate communications is a question not presented in this case. Nevertheless, an inability to assure perfect equality of access between management and dissident views is no justification for the abrogation of First Amendment rights. One could similarly purport to limit media editorials unless an equal opportunity to speak effectively could be assured to every citizen.

Similar to the shareholder, the utility ratepayer has an interest in the operation of the utility based on his or her use of the latter's products and services as well as in public policy matters which relate to the business of the utility. The Public Service Commission's order ignores the importance and significance of this relationship by unconstitutionally restricting the user's access to the utility's views and management's right and obligation to communicate those views on matters of mutual concern. If the subject of those views is characterized as "controversial," the restraint applies. Yet it is precisely in communication on controversial matters that the shared interest of the utility and its ratepayers is most clearly entitled to First Amendment protection.

There is no question that certain businesses, including utilities, are by the nature of the products and services they provide subject to regulation in the public interest. *Fletcher, Cyclopedia of the Law of Private Corporations*

§6673 (rev. perm. ed. 1975). Nor is there any question that management legitimately may be subject to regulation in the allocation and expenditure of corporate funds for purposes of participating in public debate.

The Commission's order limiting use of the bill insert mechanism for communication, however, transcends the boundaries of legitimate regulation, and includes within its proscribed ambit communications that have a legitimate business purpose, and are unquestionably subject to constitutional protection. Whether the Commission could have limited bill inserts on controversial matters of public policy to those which also had an appropriate relationship to the business or operation of the utility is a question not presented by the order at issue. Indeed, it was precisely on matters of utility business and operation, such as nuclear power, that the Commission sought to limit speech by the utility. (Appellant's Appendix E at 43a). The First Amendment cannot tolerate such a limitation.

Finally, while the Commission's order limits only one mechanism for communication, the bill insert, its practical effect is to restrain, if not foreclose, communication between management and the ratepayer on the proscribed topics because of the inefficiency and greater cost attached to any alternative communication. This Court clearly has recognized the inability of alternative channels to satisfy constitutional requirements where they are more expensive, less effective and less likely to reach the intended recipient. *Linmark Associates, Inc.* v. *Township of Willingboro,* 431 U.S. at 93. Thus, the Commission's order is constitutionally defective not only in its limitation on communication between the utility and the ratepayer but also because of the absence of equivalent methods of communication.

II. The Order of the New York Public Service Commission invalidly restricts the First Amendment's protection of speech by prohibiting its corporate exercise on issues involving "controversial matters of public policy."

In its order dated July 6, 1977, the Public Service Commission failed to define "controversial matters of public policy" and assumed responsibility for censoring non-obscene commercial information under a dictate which might be considered excessive in countries bereft of First Amendment rights. The Commission utilized a vague legislative mandate permitting it to regulate billing formats to justify this prohibition.

By its nature, utilization of mail to gain support for ideas involves a biased presentation of opinion in contrast to that disseminated by news or broadcast media wherein either a legal duty or an ethical trade obligation frequently exists to present diverse viewpoints on controversial issues. The mechanics and costs of a mailing do not warrant its utilization by its primogenitor for the presentation of opposing points of view. Instead, in a democratic society, recipients of utility bills are presumed to be aware of the origin of and presuppose a pro-utility message contained within any materials accompanying service bills. Admittedly, these messages are normally self-serving, but this is insufficient to disqualify them from public dissemination. An expert opinion on a matter of concern to at least its originator may be of material interest to other readers. Merely because a message would be offensive to some recipients, it cannot be subdued by fiat. *Carey v. Population Services International,* 431 U.S. 678, 701 (1977).

This Court may have already decided this case in its decision, *Linmark Associates, Inc. v. Willingboro,* 431 U.S. at 95, 98, 96, citing *Virginia Pharmacy Board,* 425 U.S. 772, n.24. There it held "constitutionally infirm," a local ordinance which restricted the flow of "truthful and

legitimate commercial information" so that recipients would not make decisions "inimical" to what their local government had decided was in the individual citizen's best interest. Herein, the Public Service Commission has assumed the responsibility for determining self-interest of utility customers and has barred them from receiving information, accompanying bills, concerning issues which the former determines to be controversial.

In *Willingboro*, as in the instant case, the availability of alternative means of communication was not disregarded, but insufficient to rationalize restrictions on the "free flow" of data. 431 U.S. at 92. Justice Marshall noted that the available alternative means of communication restricted the autonomy of the sender, were not likely to be regarded by persons who were not specifically seeking such information, and were generally less effective. In this case, they are also immeasurably more expensive.

Willingboro, a sign case, was a philosophical descendent of *Thornhill v. Alabama*, 310 U.S. 88 (1940), a picketing case. This Court justified in *Thornhill* the self-serving nature of information transmitted by reference to the needs of society to receive information to make its members able to cope with the "exigencies" of their period. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group of society." 310 U.S. at 102, 104. The group in power, however well meaning, may not abrogate freedom of discussion by accepting the ability to determine what is and what is not controversial and the ability to restrict the receipt of the former.

If the appellant's message deals with a subject which the Public Service Commission considers noncontroversial, defined only by example, it may be transmitted within the billing envelope. This presumes that all readers will have the same definition of controversy and more significantly that the composition of the Public Service Commission is eternal, and its appointed membership will continue to

consistently define noncontroversial and controversial matters of public policy. It would not be wildly speculative to imagine that the composition of a successor commission which could redefine these terms with reference to "its own idiosyncratic conception of the public interest" and discriminate among messages in a manner never anticipated by the 1977 incumbents responsible for the current promulgation. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969). Even the New York Supreme Court, Appellate Division, justified its decision to permit censorship in part by the assumption that the appellee and the utility companies would be "capable of distinguishing useful information . . . from management's statement on the political issues of the day." (Appellant's Appendix B at 19a). A demonstration that reasonable men have commenced embroidering the definition of controversial and facilely assumed that there will not be disagreement among opposing sides, thereby alleviating the necessity of determining the nature, controversial or not, of each proposed message. It is the contention of the *amici* that the exercise of First Amendment rights should not be subjected to the vagaries of an administrator's conscience.

"[F]irst Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). Narrow specificity is precisely what was evaded by appellee when it defined the regulation in terms of controversy. The commission has unfortunately fallen into the morass anticipated by Justice Harlan in *Cohen v. California*, 403 U.S. 15, 21 (1971). "The ability of government" to circumscribe "discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." If not, a majority is "effectively empower[ed] . . . to silence dissidents simply as a matter of personal predilections." In the instant matter, this is compounded as no advance notice of the personal predilections

of Commission members both today and in years to come is available. The Commission has tacitly encouraged itself to administer a series of *ad hoc* decisions defining the meaning of controversy which effectively empowers it to silence dissidents. No penalty for Commission inconsistencies nor prior warning of intentions is mandated under the objectionable regulation.

"The general test of vagueness" adopted by this Court in 1926, quoted with approval in *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976), must be applied "with particular force on review of laws dealing with speech." This administrative restriction must fail as "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co.*, 296 U.S. 385, 391. Because controversial is defined as "a discussion marked especially by the expression of opposing views," the management of the appellants, presumably possessed of at least common intelligence, faces a dilemma. *Webster's New Collegiate Dictionary*, 245. It must elect between guessing at the essence of a mailing after it is too late to withdraw it from circulation, and receiving appropriate sanctions, or submitting the contents of proposed insert to the Commission which may impose a prior restraint upon its circulation via billing envelopes.

Although in circumstances factually diverse from the instant matter, Justice Burger's opinion, in *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976), noted the especially damaging imposition of "prior restraint . . . upon the communication of news and commentary on current events." In the instant case, the plain meaning of the phrase, "controversial matters of public policy," is centrally located within the ambit of current events. The resolution of present energy crises is obviously controversial and the appellant's available expertise should be accessible for consideration by consumers, many of which may wish to increase their knowledge in this effortless manner. The present prohibition will not permit the receipt of this information via the appellant's least burdensome means. Therefore, there is some doubt that it will ever be brought to the consumer's attention.

In *Cohen*, a disturbing the peace ordinance was held impermissibly used to restrict an objectionable communication, obscene language on Cohen's jacket. Justice Harlan's opinion noted at the outset that the substance of message conveyed could not be prohibited however distasteful to some, if not all, readers. The controversy was regarded, as it should be herein, as arising over the use of a broad language restriction as a "convenient guise for banning the expression of unpopular views." This Court appropriately noted that the social value of the message is not the factor upon which the debate should transpire for it is one of the "prerogatives of American citizenship" to "speak foolishly" as well as knowledgeably. 403 U.S. at 26, citing *Baumgartner v. United States*, 322 U.S. 665, 673, 674 (1944). It is not the prerogative of an administrative agency with presumed expertise centered upon rate regulation and closely related duties, admittedly including billing formats, to voluntarily assume a responsibility not even permitted to be exercised by a state under a legislature's enactment. See also, *First National Bank of Boston v. Bellotti*, 435 U.S. 765.

If the PSC had restricted the utility company's freedom to include any message in the billing envelope, this Court would be faced with determining the constitutionality of a time place and manner restriction which it has occasionally sustained. *Buckley v. Valeo*, 424 U.S. at 18. Its inquiry would center on the reasonableness of preventing such intrusions into the private life of citizens. However, "when the government, acting as a censor, undertakes selectively to shield the public from some kinds of speech on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). Such restrictions must survive "rigorous" application of "constitutional standards" and demonstrate precise "drafting and clarity." 422 U.S. at 217.

A controversial matter of public policy standard does not meet this criteria, as "one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 25. This summation of the philosophical foundation of the First Amendment appropriately resolves this issue. No threat to life, privacy, or liberty of citizens is encouraged by the inclusion of a message with a utility bill and content-based restrictions on its dissemination are not warranted. Realistically, the impact of mail messages is at the discretion of the addressee who may decline to read it and place it in a convenient receptacle accompanied by the discarded envelope in which it arrived. *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 883 (D.C. N.Y. 1967) *aff'd.* 386 F. 2d 449 (2d Cir. 1967) *cert. denied* 391 U.S. 915 (1968). Therefore, this variety of administrative censorship should not be affirmed by the Court.

CONCLUSION

For the reasons stated above, the right of the Public Service Commission to promulgate a regulation denying utility companies the right to place messages concerning "controversial matters of public policy" in billing envelopes should be denied, the decision of the court below reversed and the decision of the New York Supreme Court, Albany County, reinstated.

Respectfully Submitted,

Edward H. Dowd

/s/ EDWARD H. DOWD
Attorney for the *Amici Curiae*
Suite 810
1101 N. 17th Street, N.W.
Washington, D.C. 20036
(202) 296-1683

CERTIFICATE OF SERVICE

I, Myrna P. Field, one of the attorneys for the *Amici Curiae* herein, hereby certify that on the 15th day of November, 1979, I served three (3) copies of the attached brief on the following:

PETER H. SCHIFF, ESQ.
Empire State Plaza
Agency Bldg. #3
Albany, NY 12223

JOSEPH D. BLOCK, ESQ.
4 Irving Place
New York, NY 10003

CAMERON F. MACRAE, ESQ.
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, NY 10005

Myrna P. Field

MYRNA P. FIELD
Attorney for *Amici Curiae*
Mid-Atlantic Legal Foundation,
Mid-America Legal Foundation,
Laurine Ryan, and Michael Long

Dated: November 15, 1979